China Idea Development Ltd v Ooi Kee Liang & Ors and another case

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NOS 22NCVC-197–04 OF 2015 AND 22NCVC-652–12 OF 2015
MOHD FIRUZ J
24 SEPTEMBER 2018

Companies and Corporations — Fraudulent trading — Elements of offence — Whether defendants had carried on business with intent to defraud plaintiff — Whether defendants were jointly and severally liable — Whether plaintiffs had been greatly injured and suffered loss and damages — Companies Act 1965 s 304

The proceedings before this court involved the following suits: (a) Kuala Lumpur High Court Civil Suit 197; and (b) Kuala Lumpur High Court Civil Suit 652. Whilst the plaintiff in each suit was different, the defendants in both suits were the same with the exception of the first defendant in Suit 197 but not defendant in Suit 652. Both suits were consolidated and heard by way of a joint trial. The defendant took the position that they had no case to answer. Hence no evidence was adduced by the defendant. In Suit 197, the plaintiff, China Idea Development Ltd ('CIDL') became a creditor of both Indian Corridor Sdn Bhd ('Indian Corridor') and Pembangunan Qualicare Sdn Bhd ('Pembangunan Qualicare') pursuant to a consent order recorded in the High Court of Hong Kong ('the Hong Kong consent order'). Pursuant to the Hong Kong consent order, Indian Corridor and Pembangunan Qualicare were jointly and severally indebted to the plaintiff. The Hong Kong consent order was registered as a judgment of the High Court of Malaya against Pembangunan Qualicare on 3 April 2013 and against Indian Corridor on 17 October 2014. The plaintiff contended that in the course of proceedings to secure satisfaction of the Hong Kong consent order, it appeared that the defendants carried on the business of Indian Corridor and Pembangunan Qualicare with intent to defraud the plaintiff or for fraudulent purpose. The plaintiff therefore took the position that the defendants were liable pursuant to s 304 of the Companies Act 1965 ('the CA') for the debts of Indian Corridor and/or Pembangunan Qualicare to the plaintiff under the Hong Kong consent order. In Suit 652, the plaintiff, Yanfull Investment Ltd ('Yanfull') became a creditor of both Indian Corridor and Pembangunan Qualicare pursuant to the consent order. Yanfull's pleaded case was similar to that of CIDL with the cause of action being one under s 304(1) of the CA for fraudulent trading. The issues for consideration were: (i) whether the first defendant was the beneficial owner of Indian Corridor and Pembangunan Qualicare; (ii) whether the affairs and business of Indian Corridor and/or Pembangunan Qualicare were carried on

by the first defendant in his attempts to avoid any personal liability being attached to himself; (iii) whether the proceedings in High Court of Hong Kong were commenced and continued by the defendants through and using the name of Indian Corridor and Pembangunan Qualicare; (iv) whether the defendants had carried on the business of Indian Corridor and/or Pembangunan Qualicare with the intent to defraud the plaintiff as a creditor of both Indian Corridor and Pembangunan Qualicare and/or for fraudulent purposes; (v) whether the defendants were jointly and severally liable; and (vi) whether the plaintiffs had been greatly injured and suffered loss and damages.

Held, allowing the claim with costs:

(1) There was sufficient credible evidence adduced by the plaintiff in both Suit 197 and Suit 652 respectively. The evidence led by the plaintiffs for purposes of proving its claim under s 304(1) of the CA ought to have been rebutted. Based on the testimony of PW1, PW2 and PW3 it was clear that the first defendant was the beneficial owner of both Indian Corridor and Pembangunan Qualicare (see para 46).

(2) The first defendant had in so far back as 2008 confirmed that he was the beneficial owner of both Indian Corridor and Pembangunan Qualicare. This was so despite his name was nowhere stated either as a director nor a shareholder of the companies. The fact that the first defendant had no personal obligation or liability in so far as the two companies were concerned was also confirmed by PW1 (see para 46).

(3) The Hong Kong suit was indeed commenced and continued by the defendants using the name of Indian Corridor and Pembangunan Qualicare. However, the first defendant was not a party to the Hong Kong suit. This conveniently shielded him from being directly exposed to any costs or liability incurred by the two companies (see para 46).

(4) Given the background that the first defendant was the beneficial owner of both Indian Corridor and Pembangunan Qualicare, and with the defendants election not to adduce any evidence by way of a submission of no case to answer, it could only be concluded that the defendants had carried on the business of Indian Corridor and/or Pembangunan Qualicare with the intent to defraud the plaintiff as a creditor of both Indian Corridor and Pembangunan Qualicare and/or for fraudulent purposes (see para 46).

(5) The rest of the defendants were acting under the directions and instructions of the first defendant. The defendants being the directors of Indian Corridor and Pembangunan Qualicare were 'person/s who was knowingly a party to the carrying on of the business'. Their failure to adduce evidence due to the submission of a no case to answer,

consequentially led to the presumption of adverse inference under s 114(g) of the Evidence Act 1950 being invoked appropriately against them (see para 46).

(6) The plaintiffs had been greatly injured and had been put to considerable inconvenience and expense, and suffered loss and damages when Indian Corridor and Pembangunan Qualicare failed to satisfy the terms of the Hong Kong consent order wherein the plaintiff in Suit 197 and the plaintiff in Suit 652 were supposed to have been paid a sum of HK$25m and HK$40m respectively (see para 46).

(7) The defendants' defence that the impecuniosity of both Indian Corridor and Pembangunan Qualicare was a matter that the plaintiffs ought to have known or could have known if they were diligent enough could never be a defence to an action under s 304(1) of the CA (see para 47).

[Bahasa Malaysia summary

Prosiding di mahkamah ini melibatkan kes-kes berikut: (a) Mahkamah Tinggi Kuala Lumpur Guaman Sivil 197; dan (b) Mahkamah Tinggi Kuala Lumpur Guaman Sivil 652. Walaupun plaintif dalam setiap guaman adalah berbeza, defendan dalam kedua-dua guaman adalah sama dengan pengecualian defendan pertama dalam Guaman 197 tetapi bukan defendan dalam Guaman 652. Kedua-dua guaman disatukan dan didengar melalui perbicaraan bersama. Defendan mengambil kedudukan bahawa mereka tidak mempunyai kes untuk dijawab. Oleh itu, tiada bukti yang telah dikemukakan oleh defendan. Dalam Guaman 197, plaintif, China Idea Development Ltd ('CIDL') menjadi pemiutang kepada Indian Corridor Sdn Bhd ('Indian Corridor') dan Pembangunan Qualicare Sdn Bhd ('Pembangunan Qualicare') menurut perintah persetujuan yang direkodkan dalam Mahkamah Tinggi Hong Kong ('perintah persetujuan Hong Kong'). Selaras dengan perintah persetujuan Hong Kong, Indian Corridor dan Pembangunan Qualicare secara bersama dan berasingan berhutang kepada plaintif. Perintah persetujuan Hong Kong didaftarkan sebagai penghakiman Mahkamah Tinggi Malaya terhadap Pembangunan Qualicare pada 3 April 2013 dan terhadap Indian Corridor pada 17 Oktober 2014. Plaintif berpendapat bahawa dalam prosiding untuk menjamin penyelesaian perintah persetujuan Hong Kong, ternyata bahawa defendan menjalankan perniagaan Indian Corridor dan Pembangunan Qualicare dengan niat untuk menipu plaintif atau untuk tujuan penipuan. Oleh itu, plaintif mengambil kedudukan bahawa defendan bertanggungjawab menurut s 304 Akta Syarikat 1965 ('AS') bagi hutang Indian Corridor dan/atau Pembangunan Qualicare kepada plaintif di bawah perintah persetujuan Hong Kong. Dalam Guaman 652, plaintif, Yanfull Investment Ltd ('Yanfull') menjadi pemiutang kepada Indian Corridor dan Pembangunan Qualicare menurut perintah persetujuan. Kes yang dikemukakan oleh Yanfull adalah sama dengan CIDL dengan punca tindakan menjadi satu di bawah s 304(1) AS untuk penipuan perdagangan. Isu-isu untuk pertimbangan adalah:

(i) sama ada defendan pertama adalah pemilik benefisial Indian Corridor dan Qualicare Pembangunan; (ii) sama ada hal ehwal dan perniagaan Indian Corridor dan/atau Pembangunan Qualicare telah dijalankan oleh defendan pertama dalam percubaannya untuk mengelakkan sebarang liabiliti peribadi yang dikaitkan kepadanya; (iii) sama ada prosiding di Mahkamah Tinggi Hong Kong dimulakan dan diteruskan oleh defendan melalui dan menggunakan nama Indian Corridor dan Pembangunan Qualicare; (iv) sama ada defendan telah menjalankan perniagaan Indian Corridor dan/atau Pembangunan Qualicare dengan niat untuk menipu plaintif sebagai pemiutang Indian Corridor dan Pembangunan Qualicare dan/atau untuk tujuan penipuan; (v) sama ada defendan secara bersama dan berasingan bertanggungjawab; dan (vi) sama ada plaintif telah banyak terjejas dan mengalami kerugian dan kerosakan.

Diputuskan, membenarkan tuntutan dengan kos:

(1) Terdapat keterangan yang boleh dipercayai yang dikemukakan oleh plaintif di kedua-dua Guaman 197 dan Guaman 652. Keterangan yang dikemukakan oleh plaintif untuk tujuan membuktikan tuntutannya di bawah s 304(1) AS sepatutnya dibantah. Berdasarkan testimoni PW1, PW2 dan PW3, jelas bahawa defendan pertama adalah pemilik benefisial Indian Corridor dan Pembangunan Qualicare (lihat perenggan 46).

(2) Defendan pertama telah jauh sejauh 2008 mengesahkan bahawa dia adalah pemilik benefisial bagi Indian Corridor dan Pembangunan Qualicare. Ini adalah begitu walaupun namanya tidak dinyatakan sama ada sebagai pengarah mahupun pemegang saham syarikat. Hakikat bahawa defendan pertama tidak mempunyai kewajipan atau liabiliti peribadi setakat kedua-dua syarikat berkenaan turut disahkan oleh PW1 (lihat perenggan 46).

(3) Guaman Hong Kong sememangnya dimulakan dan diteruskan oleh defendan menggunakan nama Indian Corridor dan Pembangunan Qualicare. Walau bagaimanapun, defendan pertama bukanlah pihak kepada guaman Hong Kong. Ini dengan mudahnya melindungi dia daripada terus didedahkan kepada sebarang kos atau liabiliti yang ditanggung oleh kedua-dua syarikat (lihat perenggan 46).

(4) Berdasarkan latar belakang bahawa defendan pertama adalah pemilik benefisial Indian Corridor dan Pembangunan Qualicare, dan dengan pilihan defendan untuk tidak mengemukakan apa-apa keterangan dengan hujahan tiada kes untuk dijawab, hanya dapat disimpulkan bahawa defendan telah menjalankan perniagaan Indian Corridor dan/atau Pembangunan Qualicare dengan niat untuk menipu plaintif sebagai pemiutang Indian Corridor dan Pembangunan Qualicare dan/atau untuk tujuan penipuan (lihat perenggan 46).

(5) Defendan lain bertindak di bawah suruhan dan arahan defendan pertama. Defendan sebagai pengarah Indian Corridor dan Pembangunan Qualicare adalah 'orang yang secara sengaja menjadi pihak dalam menjalankan perniagaan'. Kegagalan mereka untuk mengemukakan keterangan kerana hujahan tiada kes untuk dijawab, yang mengakibatkan anggapan bertentangan di bawah s 114(g) Akta Keterangan 1950 digunakan terhadap mereka (lihat perenggan 46).

(6) Plaintif telah banyak terjejas dan telah diletakkan dalam kesulitan dan perbelanjaan yang besar, dan mengalami kerugian dan kerosakan apabila Indian Corridor dan Pembangunan Qualicare gagal memenuhi syarat-syarat perintah persetujuan Hong Kong di mana plaintif dalam Guaman 197 dan plaintif dalam Guaman 652 sepatutnya telah dibayar sejumlah HK$25 juta dan HK$40 juta (lihat perenggan 46).

(7) Pembelaan defendan bahawa keadaan tidak mempunyai wang oleh Indian Corridor dan Pembangunan Qualicare adalah perkara yang harus diketahui oleh plaintif jika mereka berusaha tidak boleh menjadi pembelaan untuk tindakan di bawah s 304(1) AS (lihat perenggan 47).]

Cases referred to

Aneka Melor Sdn Bhd v Seri Sabco (M) Sdn Bhd and another appeal [2015] MLJU 2247; [2016] 2 CLJ 563, CA (refd)

Chin Chee Keong v Toling Corporation (M) Sdn Bhd [2016] 3 MLJ 479, CA (refd)

Dato' Gan Ah Tee & Anor (in their capacity as liquidators of Par-Advance Sdn Bhd (in liquidation)) v Kuan Leo Choon & Ors [2012] 10 MLJ 706, HC (refd)

Formis Resources Bhd & Ors v Risk Management and Safety System Pty Ltd & Ors and other appeals [2016] 6 MLJ 73, CA (refd)

Gerald Cooper Chemical Ltd, Re [1978] 2 All ER 49, Ch D (refd)

Govindasamay s/o Muthulingam v Ooi Kee Chye & Anor [2012] 7 MLJ 254, HC (refd)

Kawin Industrial Sdn Bhd (in liquidation) v Tay Tiong Soong [2009] 1 MLJ 723, HC (refd)

Leyland DAF Ltd, Re [1995] 2 AC 394 (refd)

LMW Electronics Pte Ltd v Ang Chuang Juay & Ors [2010] 1 MLJ 185, HC (refd)

Lama Tile (Timur) Sdn Bhd v Lim Meng Kwang & Anor [2015] 4 MLJ 85, CA (refd)

Maraputra v Kumagai Gumi [2000] 2 CLJ 311, HC (refd)

R v Grantham [1984] QB 675, CA (refd)

R v Sinclair [1968] 1 WLR 1246, CA (refd)

Ramayee Gengan & Ors v Tan Yik Kok & Anor [1983] CLJ Rep 828, HC (refd)

Solomon v A Solomon [1897] AC 22, HL (refd)

Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Naim [2015] 3 MLJ 609, FC (refd)

Takako Sakao (F) v Ng Pek Yuen (F) & Anor [2009] 6 MLJ 751, FC (refd)
Tradewinds Properties Sdn Bhd v Zulhkiple bin A Bakar & Ors [2019] 1 MLJ 421, CA (refd)
United Services Funds (Trustee of) v Richardson Greenshields of Canada Ltd/Richardson Greenshields du Canada Ltée (1987) 18 BCLR (2d) 360, SC (refd)
William C Leitch Brothers Ltd, In Re [1932] 2 Ch 71, Ch D (refd)

Legislation referred to

Companies Act 1965 (repealed by the Companies Act 2016) s 304, 304(1)
Evidence Act 1950 ss 101, 102, 114(g)

Su Tiang Joo (Teh Eng Lay and Nicholas Teh Yew De with him) (Cheah Teh & Su)f in Civil Suit No 22NCVC-197–04 of 2015 for the plaintif.
Kwan Will Sen (Skrine) in Civil Suit No 22NCVC-652–12 of 2015 for the plaintiff.
Gideon Tan (Irene Wong with him) (Gideon Tan Razali Zaini) for the defendants.

Mohd Firuz J:

[1] The proceedings before this court involve the following suits:

(a) KL High Court Civil Suit No 22NCVC-197–04 of 2015: plaintiff — China Idea Development Ltd ('Suit 197'); and

(b) KL High Court Civil Suit No 22NCVC-652–12 of 2015: plaintiff — Yanfull Investment Ltd ('Suit 652').

[2] Whilst the plaintiff in each suit is different, the defendants in both suits are the same with the exception of Ooi Kee Liang, who is the first defendant in Suit 197 but not defendant in Suit 652. Both suits were consolidated and heard by way of a joint trial.

[3] The trial took five days to complete wherein a total of six witnesses appeared and gave evidence for the plaintiffs. The defendant on the other hand, took the position that they have no case to answer. Hence no evidence was adduced by the defendants.

[4] In deciding the outcome of the action between the plaintiff and the defendants, emphasis was given to the issues to be tried forwarded by both parties. At the end of the trial, I allowed the plaintiff's claim with cost. The following are my grounds of decision.

A BACKGROUND OF SUIT 197

[5] The plaintiff's claim against the defendants herein is premised on s 304 of the Companies Act 1965, in that the business of a company known as Indian Corridor Sdn Bhd ('Indian Corridor') and another company known as Pembangunan Qualicare Sdn Bhd ('Pembangunan Qualicare') have been carried on by the defendants with the intent to defraud the plaintiff as a creditor and/or for fraudulent purposes.

[6] The plaintiff, China Idea Development Ltd ('CIDL') is a company incorporated in Hong Kong and has its registered address at Room 1801, 181F, Malaysia Building, 50 Gloucester Road, Wan Chai, Hong Kong. It is CIDL's pleaded case that the defendants played the following roles in respect of Indian Corridor and/or Pembangunan Qualicare:

(a) the first defendant is the chief executive officer and authorised signatory of Indian Corridor and Pembangunan Qualicare. The plaintiff's contention is that the first defendant is also the de facto director of Indian Corridor and Pembangunan Qualicare, the beneficial owner of all equity in Indian Corridor and Pembangunan Qualicare and the person having the control over Indian Corridor and Pembangunan Qualicare prior to the winding up of both companies;

(b) the second defendant and the third defendant were at all material times the directors of Indian Corridor until the winding up of Indian Corridor on 28 June 2010. It is also the plaintiff's contention that the second and third defendants acted on the instructions of the first defendant;

(c) the fifth defendant was at all material time the director of Pembangunan Qualicare until the winding up of Pembangunan Qualicare on 4 April 2013;

(d) the fourth defendant and fifth defendants were at all material time the directors of Pembangunan Qualicare wherein the plaintiff alleges that they acted on the instructions of the first defendant; and

(e) at all material time, Indian Corridor and Pembangunan Qualicare were used by the first defendant to:

(i) hold shares in a publicly listed company known as Golden Plus Holdings Berhad ('GPLUS') whereby Indian Corridor holds 27,325,800 shares in GPLUS and Pembangunan Qualicare holds 1,670,000 shares in GPLUS; and

(ii) avoid any personal liability being attached to himself.

[7] The plaintiff became a creditor of both Indian Corridor and Pembangunan Qualicare pursuant to a consent order dated 20 April 2009

recorded in the High Court of the Hong Kong Special Administrative Region Court of First Instance ('the Hong Kong consent order') in Action No 1 of 2008 ('the Hong Kong legal action'). The Hong Kong legal action was commenced on 31 December 2007 by the defendants through Indian Corridor and Pembangunan Qualicare.

[8] Pursuant to the Hong Kong consent order, Indian Corridor and Pembangunan Qualicare are jointly and severally indebted to the plaintiff in the sum of HK$15m in damages and HK$10m in legal costs with interest accruing thereon. The Hong Kong consent order was registered as a judgment of the High Court of Malaya against Pembangunan Qualicare on 3 April 2013 and against Indian Corridor on 17 October 2014.

[9] The plaintiff contends that in. the course of the proceedings in High Court of Malaya at Kuala Lumpur in Suit No 82–22–349 of 2008 ('the S2 Civil Suit') and other proceedings to secure satisfaction of the Hong Kong consent order, it appears that the defendants carried on the business of Indian Corridor and Pembangunan Qualicare with intent to defraud the plaintiff or for fraudulent purpose by the following actions:

(a) firstly, the first defendant represented that Indian Corridor and Pembangunan Qualicare were solvent, had assets and were capable of meeting their respective debts, thus leading to the Hong Kong consent order whereby the Hong Kong Legal Action was settled m return for Indian Corridor and Pembangunan Qualicare paying to the plaintiff the sum of HK$15m in damages and HK$10m in costs;

(b) sometime on or after 20 March 2009 (before the Hong Kong consent order was recorded), Indian Corridor received a statutory notice of demand dated 20 March 2009 pursuant to the Companies Act 1965 issued by one Magna Bumi Sdn Bhd. The aforesaid statutory notice of the demand from Magna Bumi Sdn Bhd was purportedly premised upon a purported debt of RM763,492.70 owing by Indian Corridor to Magna Bumi Sdn Bhd;

(c) the first defendant, the second defendant and/or the third defendant caused Indian Corridor not to contest a winding up petition presented by the said Magna Bumi Sdn Bhd against Indian Corridor, resulting in the winding up of Indian Corridor on 28 June 2010. At all material times, the statutory notice of demand dated 20 March 2009 issued by Magna Bumi Sdn Bhd was never disclosed to the plaintiff;

(d) in respect of Pembangunan Qualicare, the first defendant caused the fourth defendant to file the Civil Suit No 22NCVC-687–10 of 2012 in the High Court of Malaya at Pulau Pinang against Pembangunan Qualicare to claim for a purported friendly loan of RM2,266,441.93. At

A the same time, the first defendant and/or the fifth defendant caused Pembangunan Qualicare not to contest the said civil suit, resulting in a judgment being entered against Pembangunan Qualicare on 7 November 2012;

B (e) following that, the first defendant and/or the fifth defendant caused Pembangunan Qualicare not to contest a winding up petition presented by the fourth defendant against Pembangunan Qualicare, resulting in the order for the winding up of Pembangunan Qualicare on 4 April 2013; and

C (f) the plaintiff further contends that as a result of the aforesaid acts by the defendants, the Hong Kong consent order remains unsatisfied causing CIDL to suffer losses and damages.

D **[10]** The plaintiff therefore took the position that the defendants are liable pursuant to s 304 of the Companies Act 1965 for the debts of Indian Corridor and/or Pembangunan Qualicare to the plaintiff under the Hong Kong consent order.

E THE 652 SUIT

[11] The plaintiff, Yanfull Investment Ltd ('Yanfull') is a company incorporated in Hong Kong and has its registered address at Flat B, 23rd Floor, Max Share Centre, 367-373 King's Road, North Point, Hong Kong.

F

[12] Yanfull became a creditor of both Indian Corridor and Pembangunan Qualicare pursuant to a consent order dated 20 April 2009 recorded in the High Court of the Hong Kong Special Administrative Region Court of First Instance ('the Hong Kong consent order') in Action No 1 of 2008 ('the Hong G Kong Legal Action'). The Hong Kong Legal Action commenced on 31 December 2007 by the defendants through Indian Corridor and Pembangunan Qualicare. Under the terms of the Hong Kong consent order, Indian Corridor and Pembangunan Qualicare had agreed to pay Yanfull the sum of HK$35m in damages and HK$5m in cost (total of both sum being H approximately RM18.7m).

[13] For purposes of brevity and to avoid repetition, it would be sufficient for me to state that Yanfull's pleaded case is similar to that of CIDL with the cause of action being one under s 304(1) of the CA for fraudulent trading.

I

SUMMARY OF THE PLAINTIFF'S SUBMISSION

[14] In light of the defendants' election to submit no case to answer after the plaintiffs' had closed their case, both the plaintiffs in Suit 197 and Suit 652,

urged this court to make a finding that the evidence produced by the plaintiffs are deemed to be true and admitted and/or accepted by the defendants.

[15] The plaintiffs took the view that their claim should be allowed as based on the evidence which are deemed true, they had proven the following:

(a) that the plaintiffs are creditors to Indian Corridor and Pembangunan Qualicare arming them with the necessary locus standi to commence the action against the defendants;

(b) that the debt due and owing is based on the Hong Kong consent order dated 20 April 2009 which was subsequently registered in Malaysia is not disputed;

(c) that the business of Indian Corridor and Pembangunan Qualicare have been carried out in such a manner that the debts were incurred by both companies when the directors knew that at the time they were incurred, there is no reasonable prospect of satisfying such debts. This tantamount to an intent to defraud the creditors of both companies; and

(d) that the defendants, being the directors of the companies at the material time, are knowingly the parties to the carrying on of the business of the companies with an intent to defraud.

THE DEFENDANTS' SUBMISSION

[16] At the outset of the defendants' submission, the defendants took the position that the plaintiffs had not established a case in law against them for fraudulent trading and/or the evidence adduced was so unsatisfactory or unreliable that the plaintiffs failed to discharge its burden of proof as required under ss 101 and 102 of the Evidence Act 1950 ('the EA').

[17] For purposes of their submission of no case to answer the defendants placed reliance on the following authorities:

(a) *Takako Sakao (F) v Ng Pek Yuen (F) & Anor* [2009] 6 MLJ 751;

(b) *Govindasamay s/o Muthulingam v Ooi Kee Chye & Anor* [2012] 7 MLJ 254; and

(c) *Ramayee Gengan & Ors v Tan Yik Kok & Anor* [1983] CLJ Rep 828.

[18] To establish a claim for fraudulent trading, the plaintiffs must establish that the defendants had carried on business of the company with intention to defraud its creditors before holding any persons or officers responsible for the fraudulent acts liable for the debts. The plaintiffs in this case have not succeeded in proving so (see *R v Grantham* [1984] QB 675 and *Aneka Melor*

Sdn Bhd v Seri Sabco (M) Sdn Bhd and another appeal [2015] MLJU 2247; [2016] 2 CLJ 563).

[19] It is the defendants' contention that Indian Corridor and Pembangunan Qualicare had no intention of defrauding the plaintiffs when the Hong Kong consent order was entered on 20 April 2009 wherein Indian Corridor and/or Pembangunan Qualicare agreed to pay the sum of HKD 25m and HKD 40m to CIDL and Yanfull respectively. In this regard the defendants submitted that:

(a) there is no element of fraud whatsoever in relation to the entering of the said Hong Kong consent order by parties;

(b) despite the plaintiff's contention that Ooi Kee Liang had in the Hong Kong action affirmed an affidavit on 31 December 2007 representing that the shares of both Indian Corridor and Pembangunan Qualicare in GPLUS were unencumbered or pledged in any way whatsoever and valued at RM49,292,860 at the material time and thereby inducing the plaintiffs to enter the consent order, the facts shows that Ooi had in a subsequent affidavit dated 29 January 2008 and 21 June 2008 affirmed subsequent affidavits deposing that there was a charge to the shares in GPLUS. The fact that the GPLUS shares were encumbered was known to the plaintiffs about one year and three months before the consent order was recorded on 20 April 2009; and

(c) the very fact that the plaintiffs had full knowledge of the existence of the encumbrances long before they decided to record the consent order negates the plaintiffs' contention that the defendants had intended to defraud its creditors at the time of recording the consent order. This fact was not denied by PW6: Kuo Yin Ho.

[20] There was no intention to defraud CIDL and Yanfull when Indian Corridor and Pembangunan Qualicare were wound up by Magna Bumi and Abdul Rahman (being the fourth defendant in Suit 197 and the third defendant in Suit 652). Due to the Mareva injunction issued on 16 April 2008, restraining Indian Corridor and Pembangunan Qualicare from dealing with their assets in GPLUS, the defendants could not sell the GPLUS shares which were their sole assets to satisfy their debts at the material time. The plaintiffs were at all material time, aware of the existence of the Mareva injunction (see testimony of Huang Guoquan — PW5).

[21] It is also an undisputed fact that Bursa Malaysia had sometime around 3 August 2009 suspended the shares of GPLUS from trading. This was not caused nor engineered by the defendants but were contributed by the plaintiffs themselves.

[22] By the time the Mareva injunction was lifted by the court on

30 October 2009 (six months after the HK consent order was recorded), the shares of GPLUS owned by Indian Corridor and Pembangunan Qualicare were already rendered worthless due to the suspension by Bursa Malaysia. The suspension caused the GPLUS shares to be devalued whereby both Indian Corridor and Pembangunan Qualicare would not have ready cash or assets to satisfy the debts owing and due when the winding up petitions were presented.

[23] The above suspension by Bursa Malaysia was beyond the control of the defendants. In absence of evidence proving otherwise, there cannot be any fraud on the part of the defendants when faced with the winding up petitions. In fact, as of to date, the suspension of GPLUS has not been lifted and the company, GPLUS Holdings Bhd has been delisted.

[24] Moreover, the suspension of GPLUS was due to the failure of the holding company to submit their audited financial statements which was attributed to Yanfull (see GPLUS circular dated 31 July 2009 and 1 September 2009; Price waterhouse Coopers' Special Audit report dated 3 January 2013). Such responsibility towards the submission of audited financial statements and the quarterly reports were solely the responsibility of the plaintiffs and had nothing to do with the defendants.

[25] The defendants also took the position that Huong Guoquan ('PW5') is an evasive witness when questioned on the following issues:

(a) who are the shareholders of CIDL?

(b) whether Teh Soon Seng is a shareholder of CIDL? and

(c) whether he is familiar with the court papers relating to the Hong Kong action as well as the action before this court.

In other words, the defendants took the view that PW5 is not a credible witness who is not capable of believe (reliance placed on *Maraputra v Kumagai Gumi* [2000] 2 CLJ 311).

[26] In all the plaintiffs' only basis for bringing the claims against the defendants were simply on the following premise:

(a) causing the plaintiffs to enter into the Hong Kong consent order; and

(b) the failure of the defendants to defend the winding up petitions against Indian Corridor and Pembangunan Qualicare.

[27] The plaintiffs have not established that the defendants had conspired to engineer a scheme to cause the plaintiffs to be unable to recover their debts. There was no evidence adduced to show such conspiracy or fraud on the part of the defendants. There was also no evidence to show that the impecuniosity

of the Indian Corridor and Pembangunan Qualicare was caused by the defendants. As the defendants did not cause and/or orchestrate the assets of both companies to be worthless, resulting in the plaintiff's failure to recover the sums pursuant to the consent order, there cannot be any fraud on the part of the defendants.

[28] Furthermore, the plaintiffs only sought to register the consent order in 2013 and 2014 respectively. By this time, events had already superseded the consent order through no fault of the defendants. The defendants cannot be faulted for the plaintiffs' delay in enforcing the terms of the consent order. The actions mounted by the plaintiffs are an afterthought after their failure to recover the amounts owing by Indian Corridor and Pembangunan Qualicare.

[29] In so far as the winding up of both Indian Corridor and Pembangunan Qualicare are concerned no evidence was adduced to show that the defendants engineered them to prevent the plaintiffs from recovering any monies.

[30] Relying on the Federal Court decision in *Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Naim* [2015] 3 MLJ 609 and *Formis Resources Bhd & Ors v Risk Management and Safety System Pty Ltd & Ors and other appeals* [2016] 6 MLJ 73, the defendants contend that despite the fact that they did not call any witness and that even if the plaintiffs' evidence are unopposed (and therefore presumed to be true), this does not automatically equate to that evidence satisfying the burden of proving their case.

SUMMARY OF THE PLAINTIFFS' RESPONSE TO THE DEFENDANTS' SUBMISSION

[31] Having read both the submissions of the plaintiffs in Suit 197 and Suit 652 respectively, their responses can be summarised in the following table:

No	The defendant's arguments	Reply by the plaintiff
1	The sole businesses of ICSB and PO were limited to holding of shares in GPLUS. The plaintiff was allegedly aware of the assets held by ICSB and PQ.	Suit 197 The letter dated 18 April 2009 from the first defendant to the plaintiff had induced the plaintiff to enter into the Consent Judgment dated 20 April 2009. Suit 652 ICSB and PQ induced the plaintiff to enter into the Hong Kong consent order, with a view to making such payment when these companies were in actual fact, insolvent.
2	The plaintiff allegedly knew that ICSB's GPLUS shares were encumbered and yet proceeded to record the Hong Kong consent order.	Suit 197 (i) The defendants had not adduced any evidence to suggest that at the time there was any reasonable prospect of the sum of RM30.5m being paid. The evidence point towards there being no reasonable prospect of payment and the defendants knew about it. (ii) the first defendant knew of the Section 218 Notice dated 20 March 2009 against CIDL and Pembangunan Qualicare. Based on the evidence given by PW1, the notice was forwarded to him on 20 March 2009 or 21 March 2009. Despite receiving the notice, this was never disclosed to CIDL nor Yanfull. Suit 652 The plaintiff would not have been aware, as to the extent to ICSB's total assets or liabilities. The fact is, ICSB led the plaintiff into entering into the Hong Kong consent order, with expectation that the plaintiff would be paid when ICSB was in actual fact, insolvent at the material time.

3	CIDL had initiated Suit 22 against ICSB and PQ. CIDL also obtained a Mareva injunction against these parties. ICSB and PQ were thus supposedly unable to sell their sole assets (GPLUS shares) to satisfy their debts. This is CIDL's own doing.	Suit 197 (i) The winding up notice referred to above was not disclosed; (ii) Based on the financial records available to the plaintiff, it can be seen that the total debt of IC and Pembangunan Qualicare as at 20 April 2009 was already in the sum of RM30m excluding the amount owed to both CIDL and Yanfull which was approximately RM11.7 and RM18.7 pursuant to the Hong Kong consent order. Suit 652 ICSB and PO ought to have applied to vary the Mareva injunction — the injunction in itself is not impediment to their payment obligations.
4	GPLUS shares were allegedly rendered worthless due to the suspension of GPLUS by Bursa Malaysia, leading to thei devaluation. Thus, ICSB and PQ were said to not have had ready cash or assets (in spite of the lifting of the Mareva injunction on 30 October 2009).	Suit 197 The intention to defraud is not constituted by the fact that creditors such as the plaintiff were 1n fact defrauded. The presence of intent is sufficient. Suit 652 It is not the obligation of the plaintiff to ensure that ICSB and PQ had sufficient assets to pay the plaintiff. The critical point is that ICSB and PQ led the plaintiff into entering the Hong Kong consent order, with expectation that the plaintiff would be paid.

5	The plaintiff is to be blamed for its supposed failure to submit their audited financial statements, which resulted in the suspension of GPLUS on Bursa Malaysia. This then supposedly resulted in the devaluation of ICSB and PQ's shares (the GPLUS shares).	Suit 197 This is false. What is required to be proven is that the defendants had the intent to defraud its creditors. The fact that there was no reasonable prospect for the plaintiff to be paid at the time the HK consent order was entered into is sufficient. Suit 652 This is false. Further, the price of the GPLUS shares, even before their suspension, was insufficient to pay the plaintiff.
6	Insufficient evidence and bare allegations made to support the plaintiff's case.	Suit 197 With the defendants electing to make a submission of a no case to answer, the evidence adduced must be presumed to be true and adverse inference should be drawn against the defendants for choosing not to give any evidence. Suit 652 The documentary and oral evidence against the defendants are presumed to be true in light of the defendants' submission of no case to answer. Adverse inferences are to be drawn as well.

ISSUES TO BE TRIED

[32] Despite the plaintiffs in Suit 197 and Suit 652 having drafted the issues to be tried separately, the issues are similar. Based on the issues drafted, it would be sufficient for me to deal with the following issues for purposes of determining the claim filed by the plaintiffs vis a vis Suit 197 and Suit 652.

[33] The issues to be tried are as follows:

(a) whether or not the first defendant and/or Ooi Kee Liang was:

(i) a de facto director or shadow director of Indian Corridor and Pembangunan Qualicare;

A (ii) the person who had full control of Indian Corridor and Pembangunan Qualicare;

(iii) the person who gave directions and instructions to the rest of the defendants in their capacity as directors of Indian Corridor and/or
B Pembangunan Qualicare;

(iv) the beneficial owner of all equity in Indian Corridor and Pembangunan Qualicare; and

(v) the person having the control over Indian Corridor prior to its
C winding up as ordered by the High Court in Pulau Pinang in Companies (Winding-Up) Petition No 28–56 of 2009 on 28 June 2010 and over Pembangunan Qualicare prior to its winding up as ordered by the High Court in Pulau Pinang in Companies (Winding-Up) Petition No 28 June 01/2013 on 4 April 2013;

D (b) whether or not the affairs and business of Indian Corridor and/or Pembangunan Qualicare were carried on by the first defendant in his attempts to avoid any personal liability being attached to himself;

(c) whether or not the proceedings in High Court of the Hong Kong
E Special Administrative Region Court of First Instance in Action No 1 of 2008 were commenced and continued by the defendants through and using the name of Indian Corridor and Pembangunan Qualicare;

(d) whether or not the defendants had carried on the business of Indian
F Corridor and/or Pembangunan Qualicare with the intent to defraud the plaintiff as a creditor of both Indian Corridor and Pembangunan Qualicare and/or for fraudulent purposes;

(e) pursuant to s 304(1) of the Companies Act 1965, whether or not:

G (i) the first defendant, the second defendant and/or the third defendant are jointly and severally liable, in their personal capacity, to the plaintiff for all debts of Indian Corridor to the plaintiff pursuant to the Hong Kong consent order dated 20 April 2009 and/or the judgment of the High Court of Malaya dated 17
H October 2014; and

(ii) the first defendant, fourth defendant and/or fifth defendant are jointly and severally liable, in their personal capacity, to the plaintiff for all debts of Pembangunan Qualicare to the plaintiff pursuant to
I the Hong Kong consent order dated 20 April 2009 and/or the judgment of the High Court of Malaya dated 3 April 2013;

(f) whether or not arising from the acts of the defendants, the plaintiffs had been greatly injured and had been put to considerable inconvenience and expense, and suffered loss and damages.

PRINCIPLES OF LAW APPLICABLE

[34] In determining the issues in the present case, I am of the view that there are two main legal principles which have to be considered. They are as follows:

(a) the provisions of s 304(1) of the Companies Act ('the CA'); and

(b) the defendants election of 'No case to answer'.

Section 304(1) of the Companies Act 1965 ('the CA')

[35] Section 304(1) of the CA provides:

> If in the course of the winding up of a company or in any proceedings against a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court on the application of the liquidator or any creditor or contributory of the company, may, if it thinks proper so to do declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs.

[36] Under s 304(1), the doctrine that a company is a separate legal entity as propounded in *Solomon v ASolomon* [1897] AC 22 (HL), is negated allowing the court to pierce the corporate veil of a particular company when it appears that the business of the company has been carried on with intent to defraud its creditors. Such was explained by Mohammed Ariff Yusof JCA in *Lama Tile (Timur) Sdn Bhd v Lim Meng Kwang & Anor* [2015] 4 MLJ 85:

> Section 304 is a specific statutory provision which allows the corporate veil to be lifted in the limited situations specified. Earlier in this judgment we have underlined that it is applicable in a situation where in the course of proceedings against a company, it appears that the business of the company has been carried on with intent to defraud creditors, a creditor can make an application to court to request that the court declare that any person who was knowingly a party to such carrying on of the business of the company, to be personally responsible.

[37] For purposes of proving a claim under s 304(1), a plaintiff has to prove the following:

(a) the plaintiff has the necessary locus standi to bring the action. A creditor who discovers evidence of fraudulent trading in the course of winding up of the company concernedcan commence such action;

(b) the businesses of the company have been carried on with intent to defraud a creditor/s or the plaintiff concerned (as the case may be) or for any fraudulent purpose; and

(c) the defendants are the correct parties to be sued for as a person who was knowingly a party to the carrying on of the business.

See:

(a) *Lama Tile (Timur) Sdn Bhd*; and

(b) *Chin Chee Keong v Toling Corporation (M) Sdn Bhd* [2016] 3 MLJ 479.

[38] With reference to the term 'carried on with intent to defraud', the following cases illustrate as to the circumstances in which the courts found that there was an intention to defraud:

(a) *Chin Chee Keong*

> [48] The Company was *'not in the position to pay its creditors when the debts would fall due'* and this is evidenced by the Company's non payment for the purchases or even the judgment debt. It is also true that the Company's audited reports for the years 2002, 2003 and 2004 show that the Company 'was experiencing cash flow problem and was in financial difficulty' at the material time. The balance sheets show that *the Company had no reasonable prospect of paying its debts* in 2003 and 2004.
>
> [49] More important and of relevance is the fact that the defendants did not challenge or explain that the Company was not in debt and that it was able to pay its creditors, especially the plaintiff.
>
> [50] Despite knowing that it was not able to pay for its purchases, the Company, under the directions of the defendants proceeded to place 'unusual large orders of raw material from the plaintiff during the material period.

(b) *Aneka Melor Sdn Bhd v Seri Sabco (M) Sdn Bhd and another appeal* [2015] MLJU 2247; [2016] 2 CLJ 563:

> This was not a case *where the company was already in financial difficulties, and in debts*, but continued to invite the plaintiff to undertake the contract works despite its directors having knowledge that *the company had no reasonable prospect of paying the plaintiff for work done.*

(c) *Dato' Gan Ah Tee & Anor (in their capacity as liquidators of Par-Advance Sdn Bhd (in liquidation)) v Kuan Leo Choon & Ors* [2012] 10 MLJ 706.

The High Court in that case ruled that the company directors have carried out the business of the company with intent to defraud creditor on the basis that dividends were paid out ignoring the fact of an ongoing arbitration. Thereafter, judgment was obtained by the subcontractor and the company was wound up due to inability to pay the debt. It was held that the directors are personally liable to settle the;

(d) *In Re William C Leitch Brothers Ltd* [1932] 2 Ch 71, where Maugham J interpreted the phrase as follows:

> If a company continues to carry on business and to incur debts at a time when there is to the knowledge of the directors no reasonable prospect of the creditors ever receiving payment of those debts, it is, in general, a proper inference that the company is carrying on business with intent to defraud.

[39] More recently, the Court of Appeal in *Tradewinds Properties Sdn Bhd v Zulhkiple bin A Bakar & Ors* [2019] 1 MLJ 421, had the task of re-visiting the provisions of s 304(1) of the CA and reiterated the law as established in its earlier decision in the cases of *Chin Chee Keong*, *Aneka Melor Sdn Bhd* and *Lama Tile (Timur) Sdn Bhd*. Hasnah Hashim JCA in delivering judgment also referred to the English cases of *Re William C Leitch Bros Ltd*. Having also referred to *R v Sinclair* [1968] 1 WLR 1246 with approval, the Court of Appeal went on to state that in order to establish dishonesty under s 304(1) of the CA, the court must find that:

(a) according to the ordinary standard of reasonable and honest people what was done was dishonest; and

(b) that the actor himself must have realised that the act was by those standard dishonest.

[40] In *LMW Electronics Pte Ltd v Ang Chuang Juay & Ors* [2010] 1 MLJ 185, Vernon Ong JC (as His Lordship then was), held that the element of 'intent to defraud' and of 'fraudulent purpose' is established when a company 'continues to carry on business to incur debts at a time when there is to the knowledge of the directors no reasonable prospect of the creditor ever receiving payment of those debt, when he had no good reason for thinking that funds would be available to pay those debts when they became due or shortly thereafter'.

Note: There is no requirement to establish knowledge that funds will never become available (see *Re Leyland DAF Ltd* [1995] 2 AC 394 at p 408 and *Kawin Industrial Sdn Bhd (in liquidation) v Tay Tiong Soong* [2009] 1 MLJ 723).

[41] As to what is meant by Hperson who was knowingly a party to the carrying on of the business', the Court of Appeal in *Tradewinds* referred to *Re Gerald Cooper Chemical Ltd* [1978] 2 All ER 49. As it is not always the case, that proof of such knowledge is easily obtained, whether a person is knowingly a party to the carrying on of the business with intent to defraud can be proven by actual evidence or by way of inference based on the evidence adduced. Suffice to say that in a situation where the defendants in a particular action were appointed and/or nominated as directors of the company concerned and in the course· of the company's business enters into contracts and executes the requisite documentation for those purposes, in absence of evidence to the contrary, it can be inferred that the directors concerned are 'person/s who was

knowingly a party to the carrying on of the business' — see *LMW Electronics*.

Election of 'No case to answer'

[42] In *Syarikat Kemajuan Tfmbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Naim*, the Federal Court explained that despite a defendant not calling any witness and that even if the plaintiff's evidence is unopposed (and therefore presumed to be true), this does not automatically equate to that evidence satisfying the burden of proving their case.

[43] In *Formis Resources Bhd & Ors v Risk Management and Safety System Pty Ltd & Ors and others appeal*, the Court of Appeal referring to the *Syarikat Kemajuan Timbermine Sdn Bhd* case on the issue an election of no case to answer, stated as follows:

> even if the plaintiff's evidence is unopposed (and therefore presumed to be true) this does not automaticaffy equate to that evidence satisfying the burden of proving the existence of the settlement agreement borne by the plaintiff, or mean that the burden of proving on the balance of probabilities no longer applies, or that a case to answer is automaticaffy made out. The evidence adduced by the plaintiff must stiff be sufficient to prove the existence of the settlement agreement. This means that the trial court is obliged to evaluate the evidence of the plaintiff. That evaluation is aided by considering inter alia whether the plaintiff's evidence is chaffenged successfully in cross examination. Where the answer is in the affirmative, the assumption can no longer hold. Similarly, where the evidence led by the plaintiff contains inadmissible evidence such as hearsay, opinion, speculation or conjecture with the witness having no personal knowledge of the matters satisfied, then the assumption is also not available. Unrebutted evidence is not necessarily credible or good evidence as it may be inherently or so unsatisfactory that it cannot be relied upon.

[44] The consequences of electing not to give evidence via a submission of no case to answer, was also clearly explained by the Federal Court in *Takako Sakao (F) v Ng Pek Yuen (F) & Anor* [2009] 6 MLJ 751 at pp 759–761. There, Gopal Sri Ram FCJ held as follows:

> [4] In our judgment, two consequences inevitably followed when the first respondent who was fully conversant with the facts studiously refrained from giving evidence. In the first place, the evidence given by the appellant ought to have been presumed to be true. As Elphinstone CJ said in *Wasakah Singh v Bachan Singh* [1931] 1 MC 125 at p 128:
>
> If the party on whom the burden of proof lies gives or calls evidence which, if it is believed, is sufficient to prove his case, then the judge is bound to call upon the other party, and has no power to hold that the first party has failed to prove his case merely because the judge does not believe his evidence. At this stage, the truth or falsity of the evidence is immaterial. For the purpose of testing whether there is a case to answer, all the evidence given must be presumed to be true.

Now, what the trial judge did in the present case is precisely what he ought not to have one. He expressed dissatisfaction with the appellant's evidence without asking himself that most vital question: does the first defendant/respondent have a case to answer? This failure on the part of the trial judge is a serious non-direction amounting to a misdirection which occasioned a miscarriage of justice. The trial judge was at that stage not concerned with his belief of the appellant's evidence. She had given her explanation as to the discrepancies in the figures. And her evidence does not appear to be either inherently incredible or inherently improbable. In these circumstances it was the duty of the judge to have accepted her evidence as true in the absence of any evidence from the first respondent going the other way. He however failed to direct himself in this fashion thereby occasioning a serious miscarriage of justice.

[5] The second consequence is that the court ought to have drawn an adverse inference against the first respondent on the amount of the appellant's contribution to the purchase price as well as the existence and the terms of the mutual understanding or agreement that she had with the first respondent. Where, as here, the first respondent being a party to the action provides no reasons as to why she did not care to give evidence the court will normally draw an adverse inference. See *Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd* [1991] 1 MLJ 33. See also *Jaafar bin Shaari & Anor v Tan Lip Eng & Anor* [1997] 3 MLJ 693 *where Peh Swee Chin FCJ said: 'The Respondents had chosen to close the case at the end of the appellant's case. Although they were entitled to do so, they would be in peril of not having the evidence of their most important witness and of having an adverse inference drawn against them for failing to call such evidence should the circumstances demand it.*

[45] Based on the decision in *Takaka Sakao*, generally a defendant who elects to submit a no case to answer, faces two prospects:

(a) the presumption that the evidence given by the other party against him to be true; and

(b) the presumption of adverse inference being drawn against him.

THE COURT'S ANALYSIS

[46] Having analysed the evidence adduced by the plaintiffs and the challenge mounted by the defendants by way of cross-examination, it is my finding that there is sufficient credible evidence adduced by the plaintiff in both Suit 197 and Suit 652 respectively. It is my considered view that the evidence led by the plaintiffs for purposes of proving its claim under s 304(1) of the CA ought to have been rebutted. In view of the defendants' election of a no case to answer, I am constraint to answer each of the issues to be tried as follows:

(a) whether or not the first defendant and/or Ooi Kee Liang ('Ooi') was:

(i) a de facto director or shadow director of Indian Corridor and Pembangunan Qualicare?

(ii) the person who had full control of Indian Corridor and Pembangunan Qualicare?

(iii) was the person who gave directions and instructions to the rest of the defendants in their capacity as directors of Indian Corridor and/or Pembangunan Qualicare?

(iv) the beneficial owner of all equity in Indian Corridor and Pembangunan Qualicare? and

(v) the person having the control over Indian Corridor prior to its winding up as ordered by the High Court in Pulau Pinang in Companies (Winding-Up) Petition No 28–56 of 2009 on 28 June 2010 and over Pembangunan Qualicare prior to its winding up as ordered by the High Court in Pulau Pinang in Companies (Winding-Up) Petition No 28–6–01 of 2013 on 4 April 2013?

Answer:

Based on the testimony of PW1: Khoo Gaik Tee (the solicitor for Indian Corridor) PW2: Tan Mooi Cheng (the company secretary for Indian Corridor) and PW3: Ang Chee Hwai (the company secretary for Pembangunan Qualicare) it is clear beyond the shadow of doubt that the answer to above questions are in the affirmative.

As a matter of fact, in his affidavit dated 26 January 2008 (see Bundle B5 at p 1381 para 44), Ooi affirmed as follows:

> ... The fact is that I am actually the beneficial owner of both (IC and PQ).

Hence, I have no reason to disagree with the plaintiff's submission (Suit 197) dated 17 May 2018 at pp 16–29.

(b) whether or not the affairs and business of Indian Corridor and/or Pembangunan Qualicare were carried on by the first defendant in his attempts to avoid any personal liability being attached to himself?

Answer:

Yes.

As stated earlier, Ooi had in so farback as 2008 confirmed that he is the beneficial owner of both Indian Corridor and Pembangunan Qualicare. This is so despite his name is nowhere stated either as a director nor a shareholder of the companies.

The fact that Ooi had no personal obligation or liability in so far as the two companies are concerned was also confirmed by PW1 (see notes of proceedings on 20 February 2017 at pp 44–45).

(c) whether or not the proceedings in High Court of the Hong Kong Special Administrative Region Court of First Instance in Action No 1 of 2008 were commenced and continued by the defendants through and using the name of Indian Corridor and Pembangunan Qualicare?

Answer:

Yes.

Based on the cause papers of the Hong Kong suit which were filed as part of the Agreed Documents in the case before me, the Hong Kong suit was indeed commenced and continued by the defendants using the name of Indian Corridor and Pembangunan Qualicare.

Needless to say, the first defendant was not a party to Hong Kong suit. This conveniently shielded him from being directly exposed to any costs or liability incurred by the two companies.

(d) whether or not the defendants had carried on the business of Indian Corridor and/or Pembangunan Qualicare with the intent to defraud the plaintiff as a creditor of both Indian Corridor and Pembangunan Qualicare and/or for fraudulent purposes?

Answer:

Yes. My reasons for finding so are based on the following:

(i) circa 18 April 2009, the defendants had cause their Hong Kong solicitors to write to the respective Hong Kong solicitors of CIDL and Yanfull to propose settlement of the case by payment of the following sum:

— for CIDL: HK$15m in damages and HK$10m in costs; and

— for Yanfull: HK$35m in damages and HK$5m in costs.

(ii) both CIDL and Yanfull accepted the above proposal, believing that Indian Corridor and Pembangunan Qualicare were genuine in wanting to settle the action amicably and had sufficient assets to satisfy the sum proposed. This led to both CIDL and Yanfull entering the Hong Kong consent order dated 20 April 2009;

(iii) at the time of recording the consent order, PW1 had on 20.3.2009 forwarded a s 218 of the CA Notice by Magna Bumi Sdn Bhd against Indian Corridor to Ooi. This fact was never disclosed to CIDL nor Yanfull at any point in time (including in the proposal dated 18 April 2009). Eventually, Magna Bumi proceeded to wind up Indian Corridor on 28 June 2009 (without any resistance by the company itself nor its directors), a fact which was also not disclosed to CIDL and Yanfull;

(iv) in the case of Pembangunan Qualicare, the fourth defendant resigned as a director of Pembangunan Qualicare on 9 October 2010. Subsequently, the fourth defendant filed a suit in against Yanfull in the High Court of Malaya in Penang (Civil Suit No 22NCVC-687–1 of 2012) for a purported friendly loan of RM2,266,441.93. The statement of claim in the care averred that the company had affirmed the said debt by written confirmation dated 9 October 2010. The suit was unopposed and led to winding

A up proceeding (also unopposed; PW3, the company secretary of the company said that she forwarded the winding up petition to her client). Pembangunan Qualicare was then wound up on 4 April 2013. Strangely, PW3 gave evidence that there is no resolution nor minutes of meeting with reference to the purported friendly loan by the fourth defendant to the company; and

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(v) given the background that Ooi was the beneficial owner of both Indian Corridor and Pembangunan Qualicare, and with the defendants election not to adduce any evidence by way of a submission of no case to answer, I can only conclude that the defendants had carried on the business of Indian Corridor and/or Pefnbangunan Qualicare with the intent to defraud the plaintiff as a creditor of both Indian Corridor and Pembangunan Qualicare and/or for fraudulent purposes;

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(e) pursuant to s 304(1) of the Companies Act 1965, whether or not:

(i) the first defendant, the second defendant and/or the third defendant are jointly and severally liable, in their personal capacity, to the plaintiff for all debts of Indian Corridor to the plaintiff pursuant to the Hong Kong consent order dated 20 April 2009 and/or the judgment of the High Court of Malaya dated 17 October 2014; and

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(ii) the first defendant, fourth defendant and/or fifth defendant are jointly and severally liable, in their personal capacity, to the plaintiff for all debts of Pembangunan Qualicare to the plaintiff pursuant to the Hong Kong consent order dated 20 April 2009 and/or the judgment of the High Court of Malaya dated 3 April 2013.

F

Answer:

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Having referred to the authorities as laid out at paras [33]–[41] above, in view of the fact I answer both of the above questions in the affirmative.

From the evidence given by PW1, PW2 and PW3, it is clear that the rest of the defendants were acting under the directions and instructions of Ooi. lt is crystal clear that, the defendants herein being the directors of Indian Corridor and Pembangunan Qualicare at the material time are 'person/s who was knowingly a party to the carrying on of the business' as stated in *LMW Electronics*.

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The question of whether they were complicit to Ooi's master plan is secondary. In this regard, their failure to adduce evidence due to the submission of a no case to answer, consequentially led to the presumption of adverse inference under s 114(g) of the EA being invoked appropriately against them.

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(f) whether or not arising from the acts of the defendants, the plaintiffs have been greatly injured and have been put to considerable inconvenience and expense, and suffered loss and damages.

Answer:

Yes. This is based on the fact that Indian Corridor and Pembangunan Qualicare failed satisfy the terms of the Hong Kong consent order dated 20 April 2009 wherein the plaintiff in Suit 197 and the plaintiff in Suit 652 were supposed to have been paid a sum of HK$25m and HK$40m respectively.

[47] Last but not least, it would be a remiss of me if I fail to state my views on the defendants' defence that the impecuniosity of the both Indian Corridor and Pembangunan Qualicare was a matter that the plaintiffs ought to have known or could have known if they were diligent enough. This was akin to saying that the plaintiff was careless. This to my mind can never be a defence to an action under s 304(1) of the CA. I conclude by referring to the Canadian case of *United Services Funds (Trustee of) v Richardson Greenshields of Canada Ltd/Richardson Greenshields du Canada Ltée* (1987) 18 BCLR (2d) 360 (SC) at pp 335–336 where Southin J stated her observations along the following lines:

> ... carelessness on the part of the victim has never been a defence to an action for fraud.
>
> Once the plaintiff knows of the fraud, he must mitigate his loss but, until he knows of it, no issue of reasonable care or anything resembling it arises at law.
>
> And in my opinion, a good thing too. There may be greater dangers to a civilized society than endemic dishonesty. But I can think of nothing which will contribute to dishonesty more than a rule of law which requires us all to be on perpetual guard against rogues less we be faced with a defence of 'Ha, ha, your own fault, I fool you'. Such defence should not be countenanced from a rogue.

[48] Based on the above findings; I therefore find for the plaintiff in both Suit 197 and Suit 652 respectively with costs.

Claim allowed with costs.

Reported by Ahmad Ismail Illman Mohd Razali